Roth's IGA Foodliner, Inc. *and* United Food & Commercial Workers Union Local No. 143-A, AFL-CIO. Case 36-CA-3768

October 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on December 3, 1980, an amended charge filed on January 15, 1981, a second amended charge filed on January 26, 1981, and a third amended charge filed on January 30, 1981, by United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, herein called the Union, and duly served on Roth's IGA Foodliner, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 19, issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, the order consolidating cases, the consolidated complaint, and the notice of hearing before an administrative law judge were duly served on the parties to the proceeding.

The complaint alleges that certain employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. It further alleges that on or about May 21, 1980, a majority of the employees of Respondent in that unit designated and selected the Union as their representative for the purpose of collective bargaining. The complaint further alleges that Respondent engaged in various forms of unlawful conduct, including interrogation, promises of increased benefits, grants of pay raises, threats of discharge, and bribery, all in violation of Section 8(a)(1) of the Act.

Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, and requesting that the complaint be dismissed. Subsequently, on August 4, 1981, Respondent by stipulation withdrew its answer, with the exception that Respondent continued to deny the allegation that the unit found appropriate constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(c) of the Act. The parties further stipulated that, if the Board found the undenied allegations of the consolidated complaint to be true, that as a matter of law a bargaining order is the appropriate remedy. The stipulation agreement was executed by Respondent, the Charging Party, and counsel for the General Counsel.

On August 10, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, seeking a Board finding that Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint and a Decision and Order against Respondent in conformity with the allegations of the complaint, including a bargaining order.

On August 14, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. No response was filed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

With respect to the unfair labor practices, the complaint alleges the following:

(1) The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Respondent at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(2) On or about May 21, 1980, a majority of employees of Respondent in the unit described above designated and selected the Union as their exclusive representative for the purpose of collective bargaining.

(3) At all times since May 21, 1980, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above, for he purpose of collective bargaining.

(4) On November 21, 1980, an NLRB election was held for the employees in the unit described above in Case 36-RC-4348. On November 26, 1980, the Union filed timely objections to the election.

(5) On or about November 5, 1980, in and about the vicinity of its Woodburn facility, Respondent,

through its manager and agent, Darrel Rybloom, instructed an employee not to join the Union after his prospective transfer to Respondent's Canby facility.

(6) On or about November 18 and 20, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, interrogated its employees concerning how they intended to vote in the impending NLRB election.

(7) On or about November 18, 20, and 24, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, promised its employees increased benefits if they voted against the Union.

(8) On or about November 18, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrel Rybloom, threatened its employees with discharge by saying that, if the Union won the NLRB election, its employees might be "down the street."

(9) On or about November 20, 1980, in and about the vicinity of its Canby facility, Respondent, through Darrell Rybloom, bribed its employee to vote against the Union by giving its employee a promissory note, the conditions of which Respondent fulfilled on or about December 18, 1980.

(10) On or about December 18, 1980, Respondent gave pay raises to its employees employed in the bargaining unit described above, for the purpose of persuading its employees to abandon their support of the Union.

(11) On or about January 6, 1981, in and about the vicinity of its Woodburn facility, Respondent, through its manager and agent, Richard Thurman, threatened to discharge its employee because it believed its employee gave a statement to the NLRB.

(12) By the above-described acts and conduct Respondent has engaged in and is engaging in a course of conduct precluding the holding of a fair rerun election among the employees.

(13) The unfair labor practices described are so serious and substantial in character and nature as to warrant the entry of a remedial order requiring Respondent, as of November 18, 1980, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit described above.

(14) By the acts and conduct described above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

As stated above, Respondent by stipulation withdrew its answer to the complaint, with the exception that it continued to deny the appropriateness of the unit. Having thereby, in effect, failed to deny the allegations, and as no good cause to the contrary has been shown, the allegations in the complaint concerning the unfair labor practices are deemed to be true and are so found to be true.[1]

Respondent's only contention concerns the appropriateness of the bargaining unit. On June 17, 1980, the Union filed a petition under Section 9(c) of the Act, in Case 36-RC-4348, seeking to represent all meatcutters, wrappers, and meat department sanitation employees employed by the Employer at its Canby, Oregon, facility. On October 17, 1980, the Regional Director for Region 19 issued a Supplemental Decision and Direction of Election providing for an election among the following employees of the Respondent:

> All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Respondent at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, Respondent timely filed a request for review of the Supplemental Decision and Direction of Election. Respondent argued that the Canby meat department employees were an accretion to the already existing unit of meat department employees at Respondent's other eight stores. Respondent contended that the Canby store manager's lack of day-to-day supervision over its meat department employees, the significant employee interchange among Respondent's stores, and the interest of the union representative for the eight-store unit in representing the Canby employees rebutted the presumption of single-store unit appropriateness. By telegram dated November 13, 1980, the Board denied Respondent's request for review.[2] Respondent has presented no further evidence that would warrant reconsideration of that decision. The unit is appropriate as found by the Regional Director.

[1] Rules and Regulations of the Board, Sec. 102.20, Series 8, as amended; *Jerry C. Wilson, et al., d/b/a Wilson & Sons*, 193 NLRB 350 (1971), and cases cited therein. In view of its stipulation, Respondent admits that at all times since May 21, 1980, the Union has been designated and selected by the majority of employees in the unit as their exclusive representative. Respondent also does not deny the allegation that, by its conduct, it has precluded the holding of a fair rerun election among the employees in that unit.

[2] An election was conducted on November 21, 1980, among the employees of the described unit. The Union failed to obtain a majority of votes cast. The tally showed one for, and one against, the Petitioner, with no challenged ballots.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(1) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues, including the unit determination, raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Oregon corporation engaged in the operation of nine retail stores in northwestern Oregon. The facilities in Canby and Woodburn are the only locations involved in this proceeding. During the past 12 months, a representative period, Respondent, in the course of its business operations, had gross sales of goods and services valued in excess of $500,000. In that time Respondent also purchased and caused to be transferred and delivered to its facilities within the State of Oregon goods and materials valued in excess of $50,000 directly from sources outside the State, or from suppliers within the State which in turn obtained such goods and materials directly from sources outside the State.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The 8(a)(1) Violations

Respondent has admitted, and we have found as true, the unfair labor practices alleged in the complaint. Accordingly, we find Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom.

The parties have stipulated that as a matter of law a bargaining order is the appropriate remedy. We agree.

First, the unit involved here is small. The tally of ballots shows approximately three eligible voters. Experience has shown that an employer's unlawful conduct is magnified when it is directed at a small number of employees. Second, the unlawful acts of interrogation, bribery, threat of discharge, promise of increased benefits, and the instruction not to join the Union, detailed above, were committed by General Manager Darrel Rybloom, who was clothed with at least the apparent authority to carry out his threats. Third, the traditional remedy of a cease-and-desist order, notice posting, and a rerun election would not erase the effects of Respondent's unlawful post-election pay raises. These unit employees would not be likely to miss the inference that the source of benefits so conferred is also the source from which all future benefits must flow. *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, 409 (1964). For these reasons we find that the possibility of ensuring a fair election through traditional remedies is slight, and that employee sentiment, as expressed on May 21, 1980, is better protected by a bargaining order. See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

We therefore shall order that Respondent, upon request, bargain with the Union as the exclusive representative of all employees in the appropriate

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

unit, and, if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Roth's IGA Foodliner, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Employer at its Canby, Oregon, facility but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the acts and conduct described in the ruling above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Roth's IGA Foodliner, Inc., Silverton, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Instructing its employees not to join the Union upon transfer to its Canby facility.

(b) Interrogating its employees concerning how they would vote in any Board election.

(c) Promising its employees increases in benefits if they would vote against the Union in any Board election.

(d) Threatening its employees with discharge based on a union victory in any Board election.

(e) Bribing its employees to influence their votes in any Board election.

(f) Granting any further pay raises or increases in benefits without bargaining with the Union.[4]

(g) Threatening to discharge its employees for offering statements to the Board.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Canby and Woodburn, Oregon, facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[4] This Order is not to be construed as requiring a rescission of the benefits granted subsequent to the election.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT instruct employees not to join the Union upon transfer to our Canby facility.

WE WILL NOT interrogate employees concerning how they would vote in any Board election.

WE WILL NOT threaten employees with discharge in the event the Union wins any NLRB election.

WE WILL NOT promise increased benefits to employees in return for votes against the Union in any NLRB election.

WE WILL NOT bribe or attempt to bribe any employees to vote against the Union in any NLRB election.

WE WILL NOT grant pay raises to employees to persuade them to abandon support of the Union.

WE WILL NOT threaten to discharge employees for giving statements to the NLRB.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, upon request, bargain with United Food & Commercial Workers Union Local No. 143-A, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All meatcutters, meat department sanitation employees, meat wrappers, and the head meatcutter/meat department manager employed by the Employer at its Canby, Oregon, facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

ROTH'S IGA FOODLINER, INC.